United States Circuit Court of Appeals.

FOR THE NINTH CIRCUIT.

No. 3276.

ALRA G. FARRELL, (substituted for Belden M. Delany),
APPELLANT,

vs.

EDWARD RUTLEDGE TIMBER COMPANY
and
NORTHERN PACIFIC RAILWAY COMPANY,
APPELLEES.

BRIEF FOR APPELLEES.

STILES W. BURR,
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Counsel for Appellees.

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STATEMENT.

This case is almost identical with *West v. Edward Rutledge Timber Company*, 244 U. S. 90, which was before this Court in 221 Fed. 30; although the West case did not involve the question principally relied upon by appellant on this appeal. The present suit was commenced some

time before the decision of the West case, and much of the matter embraced in the original and amended pleadings is addressed to questions which are set at rest by that decision.

The land in controversy was selected by the defendant Railway Company, on July 23, 1901, under the exchange provisions of the act of March 2, 1899, (30 Stat. 993). This was two years prior to the settlement of the original plaintiff, Delany, to whose rights the present plaintiff and appellant claims to have succeeded, and one year prior to the earliest settlement made on the land—that of W. B. Leach, whose cabin and improvements Delany took over in 1903. In the original and amended complaint it is alleged that Leach settled on the land in April, 1901, previous to the Railway Company's selection; but at the trial this allegation was withdrawn and it was admitted that Leach did not go on the land until May, 1902—thus taking out of the case an issue which is made a rather prominent feature of the pleadings.

The land did not come under survey until eight years after the Railway Company's selection. The township plat of survey was filed in the Local Land Office on June 4, 1909; and on the same day the Railway Company duly filed its "re-descriptive list" according to the provisions of the act of March 2, 1899, and the regulations and practice of the Department. The Railway Company's selection, and the procedure thereunder were in all respects identical with that considered in the West case; and its validity, regularity and priority are authoritatively established by that decision, save as to the one special ground of attack which is principally argued on this appeal.

On June 10, 1909, a few days after the filing of the town-

ship plat of survey, and of the Railway Company's "re-descriptive list," Delany tendered an application to enter the land under the homestead law, alleging settlement on July 21, 1903. This application was rejected by the Register and Receiver; and, on successive appeals, by the Commissioner of the General Land Office and the Secretary of the Interior. Petitions thereafter made by Delany for rehearing and for the exercise of the supervisory power of the Secretary were denied. An attempted selection of the land in the name of the State of Idaho will be more particularly mentioned hereafter—for the present it is enough to say that the State's claim was rejected, and the rejection affirmed by the Secretary; and that the State acquiesced in that decision and has made no further claim to the land. Finally, in 1916, the land was patented to the Railway Company; which thereafter conveyed to the defendant Edward Rutledge Timber Company, by warranty deed, in fulfillment of a previous contract. This suit was commenced in July, 1916; and the original plaintiff and homestead claimant, Delany, having died pending the suit, the present appellant, Alra G. Farrell, was substituted as plaintiff, under allegations that she was an heir of Delany and held a conveyance from his other heirs.

In the Court below appellant rested on two propositions; both of which are urged on this appeal. The first of these propositions was that the description of the land contained in the Railway Company's selection list was insufficient, because made in terms of future survey. This question is foreclosed by the decisions of this Court and the Supreme Court in the West case, but appellant seeks to distinguish the cases on the ground that the land here involved was somewhat further from the nearest township

line of survey established at the time of selection than was the land in the West case; arguing that for this reason the rule of the West case does not apply. The second proposition is that the land was placed in reservation by an application for survey under the act of August 18, 1894, 28 Stat. 372, 394, made by the State of Idaho in July, 1901, a few days prior to its selection by the Railway Company; and that the selection was therefore void for all purposes and conferred no rights upon the Railway Company, although such reservation was not a barrier to subsequent settlement under the homestead law. These questions (together with others foreclosed by the decisions in the West case) were expressly presented to and were fully considered and decided, against appellant's present contentions, by the Commissioner of the General Land Office and the Secretary of the Interior, in the face of the same arguments and authorities urged by appellant in the Court below and on this appeal. (Record pages 86-97, 119-125, 133-134; *Daniels v. Northern Pacific Ry. Co.,* 43 L. D. 381; *Thorpe v. State of Idaho,* 43 L. D. 168; *Miles v. Northern Pacific Ry. Co.,* February 16, 1915, unreported.) And these questions were further considered and decided against appellant by the Court below. (Record pages 136-146.)

ARGUMENT.

I.

This is a suit in equity to charge the defendants, as holders of the patent title, with a trust in favor of appellant, on the ground that appellant has the superior right to the land which was disregarded by the officers of the Land Department through error of law (no fraud or mistake being claimed). And under familiar rules it is incumbent upon appellant to show, not merely that it was error to award patent to the Railway Company, but also that the entryman Delany, under whom she claims, had sufficiently complied with the requirements of the homestead law so as to be entitled to patent, as against the Government, if the claim of the Railway Company were out of the way.

Bohall v. Dilla, 114 U. S. 47, 51.
Sparks v. Pierce, 115 U. S. 408, 413.
Lee v. Johnson, 116 U. S. 48, 50.
Smelting Co. v. Kemp, 104 U. S. 636, 640, 647.

It was therefore incumbent upon appellant, in order to put her in position to raise the questions here argued, to show that Delany had fully complied with the requirements of the homestead law with respect to residence, improvement and cultivation. The evidence on these points will be found at pages 59-67 of the record. As to this the Trial Court says (Record pages 137-138):

> "Delany's acts of settlement and residence are far from satisfactory, and I have great hesitancy in holding them sufficient. True, the showing is not radically different from that in the West case, but in that case the amount cleared and cultivated was thought to be 'pathetically small', and, however broad our sympathy for the settler, a line must be drawn somewhere. I am not at all sure that the land officials would have found the showing sufficient had they considered the final proof, but inasmuch as their rejection was upon other grounds, I shall, in the further consideration of the case, assume that the residence and improvements met the requirements, under the liberal policy prevailing in the Land Department, and that the final proofs would have been accepted but for other conditions upon which the land officials acted."

We submit that this is far from an affirmative finding that the homestead law was complied with. And inasmuch as the decree was against appellant and there was no finding or determination in Delany's favor by the Land Department, there can be no presumption in her favor in this Court. Before the Court may properly enter upon a consideration of the questions urged on this appeal, it must determine, in the first instance, that the evidence presented by appellant to the Court below affirmatively shows sufficient compliance with the requirements of the homestead law with respect to residence, improvement and cultivation. And we respectfully submit, without argument, that the proof offered is inadequate to sustain such a finding; or to support the inference that Delany intended, in good faith, to make the land his home rather than to acquire a valuable tract of timber for purposes of speculation.

II.

The only possible ground for distinction between this case and the West case is that in the present case the land involved was, at the time of its selection by the Railway Company, seven miles distant from the nearest established line of survey; whereas in the West case the land was only three miles distant from the nearest surveyed line. Counsel says that the distance was seven and a half miles. But the tract selected by the Railway Company was "all of section 20", and not merely the northeast quarter of that section afterwards claimed by Delany. (Record pages 104, 110.) And section 20 in this township is only seven miles from the east line of township 43, range 2 (Record page 67).

The Trial Court says (Record page 138):

> "The description in the railroad company's selection list was in terms of future survey, as in the West case, and while the distance to the surveyed lands is a little greater, the difference is not such as to warrant a holding that as a matter of law the description was insufficient to designate the land 'with a reasonable degree of certainty.' Within reasonable limits, it is a question of fact in any case whether such a description is sufficiently certain, and a finding thereon by the Land Department within such limits will not be disturbed by the courts."

We do not concede, nor has it been held, that the sufficiency of a description like that here involved may be determined merely by consideration of the case and readiness with which, because of close proximity of established lines of survey, the land may be identified. This is not the view of the Department. Several of the cases cited above

are disposed of on a contrary theory. In *Miles v. Northern Pacific, supra,* it is said:

> "Regarding 'the lack of proximity of established Government surveys' to the lands here involved, it may be stated that, *whilst not an issue* in this case or the Daniels case, the decision in the latter case did discuss the question whether Daniels might not, from existing corners of the Government surveys, have ascertained, without much difficulty, the locus of the land he settled upon in its relation to the public surveys."

But the Secretary continues:

> "If, as appears from the record, the land was subject to selection by the Railway Company, and, prior to the settlers going thereon, the company filed its selection list in the local office—the only notice required by the act of 1899—*any difficulty the settlers might be under in determining the location of the land, due to the lack of Government surveys, could not give them rights paramount to those of the Railway Company.*"

In the decision of this Court in the West case (221 Fed. 30) it was recognized that prior to 1908 the regulations and practice of the Department not merely permitted, but required, selections of unsurveyed lands to describe the selected tract "according to the description by which it will be known when surveyed", without regard to the proximity of established survey lines, and that no other or more particular form of description was required. And it seems to be the plain purport of the decisions of the District Court, this Court and the Supreme Court in the West case that where the Railway Company has pursued the sanctioned and approved practice with respect to description of the selected land, its selection cannot be adjudged invalid upon the ground of alleged inadequacy or

indefiniteness of description, merely because the lack of proximity of established survey lines renders the identification of the land somewhat difficult to a subsequent settler without the aid of an experienced surveyor. In the West case Judge Dietrich said (210 Fed. 189, 197):

> "It is apparent that unless the view be adopted that, as a matter of law, *under no conditions* can a description by reference to the lines of the official survey be held to be in compliance with the act, the question of the sufficiency of the description is in every case one of fact, and hence not subject to review by the Courts; and I am wholly unable to assent to the proposition that such a description can under no circumstances be held to be reasonably certain."

It is true that in the opinion of this Court in the West case it was intimated that under exceptional and extraordinary conditions, which might be imagined, where the land was utterly removed from settled districts or surveyed lands, a description in terms of future survey might be held too indefinite. But that was merely a concession for the purpose of argument and not a declaration by the Court of a controlling principle of law. What this Court said was:

> "It may be conceded, *insofar as it respects this case*, that a description of a section or a quarter section by legal subdivisions in the fastnesses of the Cascades or Rocky Mountain ranges, far distant from any Government survey, or even generally that a description in terms of future survey, is not such a description as is contemplated by the statute."

And it was held that, even under this theory, and assuming the question of fact to be open to examination by the Court in that case, description in terms of future survey of land lying three miles distant from an established

surveyed line (although in a rough mountain country) was sufficiently definite and certain, as a matter of law. This is not inconsistent with the view that where the Railway Company has pursued the method prescribed by the Department, and where the Department has expressly held that the description in its selection list was sufficiently definite and certain (as in this case), its title is immune from attack regardless of the relative proximity of established surveys. At most, the question whether a given description is sufficient to "designate the land with a reasonable degree of certainty" as provided in the act of March 2, 1899, is a question of fact; and upon any question of fact the determination of the Department is conclusive, and cannot be inquired into by the Courts. As pointed out by Judge Dietrich, in the language quoted above; "unless the view be adopted that, as a matter of law, *under no condition* can a description by reference to the lines of the official survey be held to be in compliance with the act, the question of the sufficiency of the description is in every case one of fact, and hence not subject to review by the Courts."

And in the West case this Court said:

> "To prevail, the plaintiff must sustain the position that the description contained in the Railway Company's selection list first filed was, as matter of law, insufficient to support the selection, for if it depended on a matter of fact the controversy would be settled by the judgment of the Land Department in rejecting the application of West for homestead entry and approving the selection of the Railway Company. 'It has undoubtedly been affirmed over and over again,' says the Supreme Court, 'that in the administration of the public land system of the United States questions of fact are for the consideration and judgment

of the Land Department, and that its judgment thereon is final.' Burfenning v. Chicago, St. Paul, etc. Ry., 163 U. S. 321, 323."

However, suppose we lay these considerations aside and assume that it is permissible for the Court to re-examine the question for the purpose of determining whether the land in suit was so far distant from established lines of survey that the determination of the Department that the description was sufficiently definite and certain constituted error of law. In the West case the Supreme Court (as well as this Court and the court below) held a similar description sufficient as applied to a tract three miles from the nearest survey line. The land in suit was, at the time of selection, seven miles from the nearest line of survey. That land and this are in adjoining townships, and the physical characteristics of the country are the same. Under such circumstances is it permissible for the Court to hold insufficient a description held good in the West case? For it must be remembered that the question is one of *fact*, depending upon physical and other conditions as to which the Department is peculiarly well informed, and that a determination of *fact* by the Department is conclusive and not subject to review by the Courts.

III.

We pass now to the question which is the real issue in the case. As already stated, appellant's theory is that the land was placed in reservation by an application for survey under the act of August 18, 1894, made by the

State of Idaho in July, 1901, a few days prior to its selection by the Railway Company; and that the selection was therefore void for all purposes and conferred no rights upon the Railway Company, although such reservation was not a barrier to subsequent settlement under the homestead law.

The first question which confronts the Court, therefore, is whether there was a *valid* application for survey under the act of 1894, which became effective *before* selection of the land by the Railway Company on July 23, 1901. If this question can be resolved in appellant's favor, it will then become necessary to determine whether such application for survey resulted in an absolute reservation or withdrawal of the land, so that no rights whatever attached under the Railway Company's selection, notwithstanding the fact that the State thereafter failed to make a valid selection of the land and could not and did not acquire any rights therein.

Both these questions have been determined adversely to appellant's theory by numerous decisions of the Land Department, as well as by the Court below. After some early vacillation, the Department has consistently held, first, that the application for survey with which we are here concerned was invalid and never became effective; and second, that a valid application for survey merely creates a preference right in favor of the State, and that a subsequent selection under an act like that of March 2, 1899, initiates a claim which is effective against all the world unless the State itself thereafter succeeds in appropriating the land under the provisions of its granting act—which it here failed to do. And appellant can prevail only if the Court holds the decisions of the Department

erroneous in law as to *both* these issues. If *either* was correctly decided her case falls.

1.

The facts with respect to the application for survey are somewhat complicated, and there are some inconsistencies in the earlier decisions of the Department which tend to confusion. It is therefore essential to a proper understanding of the case, not only that the facts be attentively considered, but also that the chronological relation of the various steps taken be kept clearly in mind. And we believe that it will conduce to a better understanding of the situation if we preface our outline of the steps taken under the actof 1894 with a brief analysis of the act itself.

This act was passed in aid of land grants previously made by Congress to Idaho and other western states. An important feature of these granting acts was the so-called quantity and indemnity grants, requiring affirmative selection by the States; and this right of selection could only be exercised after survey. Complaint was made that the States were usually worsted in the race to the Land Office, and Congress thereupon passed the act of March 3, 1893, which gave a preference right of selection for sixty days after filing of the township plat of survey. This, however, was said to be insufficient, because it gave no protection against claims attaching before survey under laws permitting selection of unsurveyed lands and the initiation of homestead claims by settlement before survey; and the States demanded legislation under which some preference could be secured against such claims. In response to this demand Congress passed the act of 1894.

In construing that act its object and purpose must, under familiar rules, be kept always in mind. This was no more than to give the States a preference right of selection of designated unsurveyed lands, as against claims initiated after such designation is made. It was no part of the purpose of the act to discourage homestead settlements on unsurveyed lands, nor to limit or destroy the right of appropriation of such unsurveyed lands under other acts. Indeed, the act of March 2, 1899, with which we are here concerned, and the acts of June 4, 1897, and July 1st, 1898, were all passed long after the act of August 18, 1894; and by each of those acts the selection of unsurveyed lands is expressly authorized.

So while it may be that by the literal terms of the act of 1894, the result of a valid application for survey is to "reserve" or "withdraw" the land designated in the application; nevertheless the true construction of the act, as settled by repeated decisions of the Land Department, is that the application for survey does *not* effect a "reservation" or "withdrawal" of the lands, in the sense in which those words are ordinarily used in land law terminology, but merely secures to the State a preference right of selection. The land is not *segregated* by the application for survey (as it is by an ordinary entry or selection) so as to constitute a bar to the initiation of subsequent claims. Any claim thereafter initiated is, of course, subject to the preference right of the state, and will be defeated by a valid selection thereafter made by the State within the preference period. But if the State does not select the particular land, or if an attempted selection by the State is rejected as unauthorized or illegal (as in this case), the

individual claimant is accorded priority over all other claims subsequently asserted. In one case, and one only, a contrary view was expressed. That is the Departmental decision of March 20, 1911 (39 L. D. 583) quoted at length and so much relied upon in appellant's brief. But that case stands alone and unsupported; it is inconsistent with all other prior and subsequent Departmental decisions on the subject; of which there are many; and it has since been expressly overruled and repudiated.

Another thing to be kept in mind in considering the provisions of the act of 1894, and the steps taken under it in the present instance, is the well established rule that the preference or privilege conferred by the act is in derogation of the common right to appropriate public land under other laws; and hence that it must be strictly construed and strict performance required of those steps upon which its operation is conditioned. See authorities hereinafter cited.

Now the terms of the act of 1894 require the following conditions to be performed in order that the State may acquire a preference:

(a) The Governor shall file with *the Commissioner of the General Land Office* a written application for the survey of the designated township or townships.

(b) Published notice of such application, sufficient to "give notice to all parties interested of the fact of such application for survey and the exclusive right of selection by the State" for the prescribed period, shall be given by the Governor within thirty days after the date of the *filing of the application.*

(c) Such notice shall be published in a newspaper of general circulation in the vicinity of the lands designated, "which publication *shall be continued for thirty days from the first publication.*"

(d) The Commissioner of the General Land Office shall immediately give notice of the reservation of the designated township, or townships, to the local Land Office in the district in which the land is situated.

(e) The Commissioner shall immediately give notice of the application to the Surveyor General of the State, who shall thereupon cause the required survey to be made.

Notwithstanding some uncertainty in the earlier cases, it is now the settled law of the Department that strict compliance with these provisions is a condition precedent to the attaching of the preference right of the State; and also that the act contemplates, by necessary implication, the recognition and allowance of the application for survey by the Commissioner of the General Land Office, so that in the absence of such recognition and allowance the preference provisions of the act are inoperative.

In July, 1901, the Governor of Idaho undertook to apply under the act of August 18, 1894, for the survey of eighteen townships in northern Idaho, including township 43, range 4, with which we are here concerned. He signed a form of application which bore date July 5th, 1901, and which was addressed *to the Surveyor General for Idaho* and the Commissioner of the General Land Office. This paper was filed, not with the Commissioner of the General Land Office as required by the act of 1894, but in the office of the Surveyor General at Boise. It was so filed, not

on the day of its date, but on July 8, 1901. On or shortly after July 10, 1901, it was transmitted by the Surveyor General, of his own initiative, to the Commissioner of the General Land Office, and was received in the General Land Office on July 15, 1901. It is now authoritatively settled that the application was not effective for any purpose until the date of its receipt by the Commissioner; and it is only by a stretch of construction favorable to the State (and consequently to the appellant) that it can be deemed to have been filed with the Commissioner, within the meaning of the act, on the latter date.

In assumed compliance with the provisions of the act of 1894 requiring published notice of the application for survey, the Governor issued a notice dated July *6,* 1901,—two days before the delivery of the application to the Surveyor General and nine days before the date when the application was filed with the Commissioner and first became effective for any purpose. This notice, speaking from its date, declared that the Governor *had theretofore applied* under the act of 1894 for the survey of the townships named; and that those townships were reserved from other appropriation for a period to extend *from the time of such application* until the expiration of sixty days after the filing of the township plat of survey. As a matter of fact the Governor had *not* applied at the date of the notice, or at the time it was first published; and the notice was therefore false and misleading in a most essential particular. The authorities to which we shall refer demonstrate that it is fatal to a notice of this character if the date when the preference or reservation takes effect, as well as the period for which it runs, is incorrectly stated.

The notice was published in six weekly issues of an Idaho newspaper, commencing on July 10, 1901, and ending August 14, 1901. The act of 1894 provides that publication of the required notice shall commence "within thirty days *from* the filing of the application"; and that such publication "shall be continued for thirty days from the first publication." The word "from" as here used must be held synonymous with "after". As the notice was first published on July 10, five days *before* the filing of the application, that publication of the notice, at least, was ineffectual and must be disregarded. The construction most favorable to the State (and the appellant) is that the first publication made after the application was filed, viz.: the publication of July 17th, was the first effectual publication of the notice. And as it was last published on August 14th, the requirement of the statute that the publication "shall continue for thirty days from the date of the first publication" was not complied with.

The application for survey embraced eighteen townships, containing more than 403,000 acres of land; and the State had theretofore applied for the survey of a large number of other townships throughout the State, which had not yet been surveyed and from which no selections had been made. At that time the quantity grants to the State were largely satisfied; and as this was long before the establishment of the principal forest reserves, and the great losses which the State afterwards claimed to have suffered through the inclusion of "school sections" within such reserves were then unknown and unforseen, a relatively small acreage was required to satisfy the State grants under conditions then existing. And the area of available lands in townships for the survey of which the

State had theretofore made application, to say nothing of the townships named in the application of July, 1901, was enormously in excess of any apparent requirements.

Passing upon the application for survey in the light of these facts, the Commissioner, on July 19, 1901, held that the application in question was excessive and improvident, and declined to recognize or allow it. Due notice of this action was given to representatives of the State, but no appeal from the decision was taken. It has since been established that the action of the Commissioner was within the authority vested in him by law; that his order was subject to appeal under the rules and practice of the Land Department, and if erroneous, could have been corrected on appeal; and that, whether erroneous or not, the order became final and conclusive upon the lapse of the prescribed period without appeal.

The application for survey having been rejected by the Commissioner, no notice of such application was given to the local land officers and no notation or other record of the application or of any reservation of the townships named therein was entered upon the records of the local offices as required by the affirmative provisions of the act of 1894; nor was the notice of the application given by the Commissioner to the Surveyor General as required by that act. Neither was any action taken on behalf of the State to have the fact of the application or its claim of preference or reservation noted on the records of the local land offices. Therefore, when the Railway Company selected the land on July 23, 1901, and for many years thereafter, the records in the Coeur d'Alene Land Office (and the records of the General Land Office, as well) contained no showing of this application or of the State's preference

claim; but on the contrary it appeared from those records that the land was free from claim or appropriation and open to selection by the Railway Company.

In January, 1905, as a result of some subsequent efforts on the part of the State and a supplementary application for survey of the townships in question, followed by a deposit by the State to cover the cost of survey, the General Land Office was persuaded to accord a qualified recognition to the claim of the State as to certain of the townships embraced in the application of July, 1901. And on January 20, 1905, the Commissioner addressed a letter to the Register and Receiver of the Coeur d'Alene Land Office directing those officers to give notice by publication of the reservation of the specified townships

> *"from and after * * * January 18, 1905, and for a period extending from January 18, 1905,* until the expiration of sixty days from the filing of the official plats of survey of the designated townships in your office * * * during which period the State authorities may select any of the lands situated in said townships, *which are not embraced in any adverse claim".* (Record, p. 132.)

The first entry ever made in the Coeur d'Alene Land Office which in any way recognized, or was based upon, this application for survey, was the entry made in obedience to the Commissioner's letter of January 20, 1905. And that entry, by its express terms, indicated that the right of the State dated from January 18, 1905, and was subordinate to claims initiated prior to that date. It was at one time assumed, that this action gave the State a preference right dating from January 18, 1905; but subsequently, upon full consideration, the Department finally held (and this position has been consistently adhered to

ever since) that the application for survey was ineffective for any purpose, and that the State acquired no preference right whatever thereunder.

On July 30, 1909, after the filing of the township plat of survey in the local land office, application was made in the name of the State of Idaho to select this and other land in the township, under the indemnity provisions of the State school land grants, in lieu of certain designated sections 16 and 36 alleged to have been lost to the State by reason of their inclusion in forest reserves. The proffered selections were rejected, and the rejection affirmed by the Secretary on appeal. It was held that the application for survey made by the State under the act of August 18, 1894, never became effective, and that the State acquired no preference right thereunder. And it was further held that even should it be conceded that the State had a preference right of selection, nevertheless under the constitution and laws of Idaho, as construed by the Supreme Court of that State, the representatives of the State were without authority to make selections in lieu of the bases tendered; that an act of the legislature of Idaho passed February 8, 1911, had no retroactive effect; and that the proffered applications to select were in and of themselves unauthorized and void. It was also held that neither the application for survey, nor the attempt by the officers of the State to select the land in July, 1909, in any manner prejudiced or affected the validity of the Railway Company's selection of July 23, 1901; that that selection was in all respects regular and valid, and entitled the Company to the land; and that as Delany's settlement was made two years after selection by the Railway Company,

he acquired no rights thereunder. As already stated, the State acquiesced in the decision and is out of the case.

2.

In disposing of this question the learned trial judge said (Record pages 138-145):

> "The defendant Railway Company filed its selection lists, under the exchange provision of the act of March 2, 1899, (30 Stat. 993), on July 23, 1901, about a year before settlement by any person. A few days prior to such selection, however, the State of Idaho had made application for the survey of a large body of land, including that in controversy, under the provisions of the act of August 18, 1894, (28 Stat. 373, 394), and the question is, whether the proceedings taken by the State prior to July 23rd operated so far to withdraw the land from the public domain that it could not be selected by the Railroad Company either absolutely or conditionally. By the Land Department the question was answered in the negative, first, because there was no valid, effective application for survey before the Railroad Company filed its selection list, and, second, because, by the settled construction of the Department, lands, even though embraced in a valid application for survey by the State, may be selected by a Railroad Company subject to the State's preference right. Such preference right the State has here failed to assert, and no claim upon its part is presently involved.
>
> "Under the act of 1894 it is provided that (a) the application for survey must be made by the Governor of the State to the 'Commissioner of the General Land Office', (b) notice of the withdrawal or reservation of the land is to be immediately given by the Commissioner to the Surveyor General of the State, and to the district Land Office, and, (c), within thirty days from the filing of the application, the Governor of the State must give notice of the application by publication for thirty days in a local newspaper. The lands so to be surveyed 'shall be reserved, upon the filing of

the application for survey, from any adverse appropriation, by settlement or otherwise, except under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of filing the township plat' in the proper district Land Office.

"On July 8, 1901, the Governor of Idaho filed with the Surveyor General an application bearing date July 5th, for the survey of eighteen townships, including township 43 North, Range 4 East, and by the Surveyor General the application was sent to the Commissioner of the General Land Office, by whom it was received July 15th. It is clear, I think, that the application did not become effective for any purpose until it reached the General Land Office, and such is the holding of the Land Department. A notice bearing date July 6th was published in six weekly issues of a local paper, the first publication being on July 10th, and the last on August 14th. Assuming that the first effective publication was that of July 17th, two days after the receipt of the application by the Commissioner, I am inclined to the view that sufficient notice was given to meet the requirements of the law; the publication was made in every issue of the paper published during the thirty-day period following the filing of the application.

"As already stated, the application was for the survey of eighteen townships, or approximately 403,000 acres, and other applications of a similar character were pending. Taking cognizance of the vast area thus applied for, and of the limited right of selection remaining in the State, the Commissioner, on July 19, 1901, considered the application in question to be excessive, and declined to recognize it. *No appeal having been taken by the State from his ruling, the same became final and binding,* provided, of course, that the Commissioner was acting within his jurisdiction. The application having been declined, *no notice of its filing was given to the district Land Office, and no notation was ever made upon the township plats in that office or upon any of its records,* of the reservation or withdrawal of the land. Such was the

status of the application and of the Land Office records, when, upon July 23rd, the Railroad Company filed its selection lists. Later, in January, 1905, it seems that as a result of certain supplementary proceedings, the General Land Office recognized the preference right of the State, *but only from January 18, 1905, not from July 15th, 1901,* as appears from a letter of date January 20, 1905, from the Commissioner to the Register and Receiver of the district Land Office, by which the latter officers were directed to give notice of the reservation of certain townships, including 43--4, 'from and after * * * January 18, 1905, and for a period extending from January 18, 1905, until the expiration of sixty days from the filing of the official plats of survey of the designated townships in your office, * * * during which time the State authorities may select any of the lands situated in said township, which are not embraced in any adverse claim'.

"Upon the question of the power of the Commissioner to reject an application for survey, the act of 1894 is equivocal, and the rulings of the Land Department have not been entirely uniform, the later decisions, however, being in support of such jurisdiction. *N. P. R. R. Co. v. Idaho,* 39 L. D. 583; *Thorpe v. Idaho,* 43 L. D. 168; *State v. Roberson,* 44 L. D. 448. (Also the decision here involved.)

"The language of the act, it is thought, is more readily susceptible to the construction adopted in the first decision, but in practical administration such a meaning gives rise to the most serious difficulties. In that view, a State with an unsatisfied grant of a thousand acres could, by the very simple and inexpensive process of filing an application in the General Land Office and publishing a notice for thirty days, withdraw from entry the entire area of public land, however great, within the State. Is it possible that Congress contemplated or intended such a result? By the terms of the act, the application for survey must be made only 'with a view to satisfying the public land grants * * * to the extent of the full quantity of the land called for' by the granting acts. Is not the right, therefore, to be regarded as commensurate with the needs of the State? I am not suggesting

that the amount applied for cannot in any case properly exceed the unsatisfied grant. The application must be for an entire township, whereas a smaller amount might be sufficient to satisfy the grant. But giving consideration to the extent of the grant and the character of the lands, and the interest of the Government in having its public lands disposed of and not needlessly withdrawn from entry, it is thought that the area to be surveyed must bear some reasonable relation to the area the State has the right to select. Such being the extent of the right or privilege conferred upon the State, it follows that an application for an excessive survey, being unauthorized, is ineffective, and it is for the officers of the Land Department, charged as they are, with the sale and disposition of public lands, to determine whether in any given case the application is within the law. In any other view I am unable to see how the interest of the Government can be protected. If therefore in fact the application under consideration was found to be excessive, the Commissioner of the General Land Office did not exceed his jurisdiction in declining to recognize it, and in refusing to take any steps to carry it into effect.

"It is further contended by the plaintiff that, defective though it may have been, the application served to withdraw the land from the operation of the act of 1899, reference being had to the familiar principle that the segregative effect of an entry or other selection is not necessarily dependent upon its inherent validity. *Holt v. Murphy*, 207 U. S. 407; *McMichael v. Murphy*, 197 U. S. 304; *Hodges v. Colcord*, 193 U. S. 192; *Sturr v. Beck*, 133 U. S. 541; *Edith G. Halley*, 40 L. D. 393. If, however, as is held, the Commissioner of the General Land Office had the power to reject it, *the application never became operative for any purpose. To have segregative effect, an invalid application or entry must in some way be accepted or recognized by the Land Department;* having been allowed, even though erroneously, it is binding upon and segregates the land. *But here at the very outset there was a declination to recognize the application.* If, however, we assume that the application was valid, and that the Commissioner was without power to re-

ject it, it must be borne in mind that it constituted no offer to enter the land, but amounted only to a request to have it surveyed. *The land was not entered or selected; the State made no specified claim*, and it might ultimately decide not to select a single subdivision. True, the terms 'reserved' and 'withdrawn' are used in the act, but when we consider its intent and purpose, clearly the only effect contemplated was to confer upon the State a preference right to select, at its option. *By the filing of the application the State initiated no claim or right to any portion of the land.* As has been very properly held by the Land Department, I think, the position of the State is closely analagous to that of a successful contestant after the cancellation of record of the contested entry. The land embraced in such entry is, as a result of the cancellation, fully restored to the public domain, and is no longer segregated or reserved, but the contestant possesses the preference right of entry. Accordingly, following the practice in relation to such contested entries, the Department holds that the pendency of such preference right does not operate to prevent the filing of other applications, subject to such preference right. *Stewart v. Peterson*, 28 L. D. 515; *Cronan v. West*, 34 L. D. 301; *State v. N. P. R. R. Co.*, 37 L. D. 70; *Swanson v. N. P. R. R. Co.*, 37 L. D. 74; *Delany v. N. P. R .R. Co.*, unreported, decision November 18, 1915). No good reason is apparent for holding such a practice illegal.

"Our attention is directed to the language of the act of March 2, 1899, creating and defining the limits of the right of the Railroad Company to select, wherein it is authorized 'to select, in exchange for lands relinquished by it, an equal quantity of non-mineral public lands * * * not reserved, and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection', etc. But this language does not alter the question. Neither can a citizen rightfully settle upon or enter land unless it be public land, not reserved, and to which no private rights have attached or been initiated, etc. And yet the plaintiff asserts the right of her predecessor to settle upon and claim the land in controversy long after the state filed its

application, and after the Railroad Company filed its selection. The right of the Railroad Company to select is quite as broad as the right of the citizen to 'homestead'. As already suggested, by its application for survey the State initiated no claim to this land; it was merely given a certain length of time to determine whether it would make such claim, and while the term 'reserved' is used, plainly there is no reservation in the ordinary sense, as for some Governmental purpose. The moment the preferential period in favor of the State expires, the lands may be entered by any qualified person, the same as in the case of other public lands.

"In view of these considerations, it is thought that the Land Department acted upon a proper construction of the law, and accordingly the plaintiff's bill will have to be dismissed, and such will be the order."

The question at issue is so ably and exhaustively dealt with by the Court below, that we might well submit the case upon his discussion of it, without further argument. But because of the importance of the question, it seems best to supplement the opinion with some of the reasoning and authorities which were submitted to the trial court and which, presumably, influenced the decision.

3.

Now, of course, if there was no valid application for survey, there was no "reservation" or "withdrawal" of the land, under any possible construction of the act of 1894. It is only upon the theory that the land was reserved or withdrawn as the result of an application for survey, effective before selection by the Railway Company on July 23, 1901, that the validity of that selection can be questioned. This is plain enough on principle and from the

language of the act itself, but it is also settled by a long and unbroken line of Departmental decisions. Whatever doubt or uncertainty may have for a time existed with respect to the construction and effect of some of the provisions of the act of 1894, there was never any doubt or uncertainty as to this proposition.

William E. Cullen, 32 L. D. 240.
McFarland v. State of Idaho, 32 L. D. 107.
Kay v. State of Montana, 34 L. D. 139.
State of Washington, 37 L. D. 2.
State of Idaho v. Northern Pacific, 42 L. D. 118.
Thorpe v. State of Idaho, 43 L. D. 168.

It is also well settled that the steps which the act requires to be taken on behalf of the State, are conditions precedent, and that strict compliance with such provisions is essential.

In the case of *William E. Cullen*, 32 L. D. 240, the Department said:

> "The law grants to the State a special privilege in derogation of the common right of others to appropriate the public domain under the general land laws, and must be strictly construed and the State held to strict compliance."

This principle has been reaffirmed and applied in a number of cases, including *State of Idaho v. Northern Pacific*, 42 L. D. 118, where the Secretary quoted the following language from the opinion of the late Justice Lurton, then Circuit Judge, in *Campbellsville Lumber Co. v. Hubbert*, 112 Fed. 718, 724, (a decision in which Mr. Justice Day, then Circuit Judge, concurred):

> "An attentive consideration of the principle of statutory construction here involved leads us to conclude that when a statute gives a new and unusual remedy, and directs how the right to the remedy is to be acquired or enjoyed, and how it is to be enforced, the act should be strictly construed; and the validity of all acts done under the authority of such an act will depend upon a compliance with its terms. In respect to such acts the steps pointed out for the acquisition, preservation and enforcement of the remedies provided should be construed as mandatory, rather than optional. (Citing *Sutherland on Statutory Construction,* Sections 454 and 458 and other authorities.)"

In many of the cases cited above the question turned upon the sufficiency of the notice and publication required by the act of 1894; and in all those cases it is held that a proper notice, and publication thereof in strict accordance with the terms of the statute, are absolutely essential. The learned trial judge was inclined to think that the publication of the notice involved in this case might be held sufficient, notwithstanding the irregularities pointed out; and he does not appear to have considered the defect in the notice itself. Of course, in the view which the Department and the Court below have taken of the matter (and which we ourselves take) it is quite immaterial whether the notice and publication were good or bad. And we shall spend no more time on the point, save to assert our confident belief that the notice and publication were fatally defective, and the application for survey ineffectual for this reason, even if it could be sustained as against other objections; submitting the question on the authorities cited above and those which follow:

Rondout v. First National Bank, 37 Ill. App. 296.

Metropolitan Bank v. Moorehead, 38 N. J. Eq. 493.
Early v. Doe, 16 How. 610.
State v. Tucker, 32 Mo. App. 620.
State v. Cherry County, 58 Neb. 734, 79 N. W. 825.
Finlayson v. Peterson, 5 N. D. 587, 67 N. W. 953.

4.

Appellant's counsel make no real attempt to uphold the validity of the application for survey, unless this is to be implied from their somewhat extended reference to the opinion of Assistant Secretary Pierce in *Northern Pacific v. State of Idaho,* 39 L. D. 583, (which has since been repudiated and overruled by the Department). Their position appears to be that as the validity of the application was for a time assumed by the Department, it was sufficient to defeat the Railway Company's selection, notwithstanding the earlier decisions recognizing the application were erroneous in law and fact and have since been recalled and vacated. This is a question which will be discussed hereafter.

Little need be added to what the trial court has said respecting the application for survey. It is apparent, as the court below points out, that (aside from all other considerations) the action of the Department in rejecting and disallowing the application was sufficient to prevent the attaching of any rights thereunder, unless the Department was wholly without jurisdiction to pass upon and reject the application as improvident and excessive, in any conceivable state of facts. For if there was *jurisdiction,* the

ruling of the Commissioner, involving (as it did) a determination of fact, and being acquiesced in by the State without appeal, was final. It is not for the court to say, at this time, whether the Commissioner was right in holding that the particular application was excessive in the light of the facts then before the Department. The only theory upon which that action could now be reviewed and overridden is that the act of 1894 gave the State an absolute right to tie up every acre in every unsurveyed township in the State, although a single quarter section would have been sufficient to satisfy completely its unfilled grants.

Confusion may result unless attentive consideration is given to the later decisions of the Department dealing with the question. For while it is now well settled that this particular application for survey was inoperative and ineffectual, and neither conferred any right on the state nor constituted an obstacle to claims initiated after it was made, nevertheless in some of the earlier decisions a contrary view was taken. The rulings in favor of the State in the earlier cases seem to have been due partly to failure to give due consideration to the facts surrounding the application for survey, and partly to an erroneous view of the functions and authority of the Commissioner in proceedings under the act of 1894. See *Thorpe v. State of Idaho,* 35 L. D. 640, 36 L. D. 479, 42 L. D. 15; *Williams v. State of Idaho,* 36 L. D. 20, and *Northern Pacific v. State of Idaho,* 39 L. D. 583. But on further consideration of the same cases, those decisions were recalled and revoked, and it was expressly held that the application for survey never became effective, and that the State never acquired any preference right thereunder; much less that a reser-

vation or withdrawal of the lands resulted. *Thorpe v. State of Idaho,* 43 L. D. 168. And this conclusion has consistently been followed in all subsequent decisions on the subject, some of which are cited below:

State of Idaho v. O'Donnell, 44 L. D. 345.

State of Idaho v. Roberson, 44 L. D. 448.

Northern Pacific v. State of Idaho, 45 L. D. 37.

McDonald v. Northern Pacific, Secretary's decision of October 30, 1914, unreported, Record, pp. 133-135.

Delany v. Northern Pacific, Secretary's decision of November 18, 1915, unreported, Record, pp. 119-121.

State of Idaho v. Northern Pacific, Commissioner's decision of July 16, 1914, unreported, Record, pp. 86-97.

And see: *State of Idaho v. Northern Pacific,* 42 L. D. 118.

It is to be borne in mind that the latest decision in the Thorpe case (43 L. D. 168) represents the final action of the Department in the very cases in which contrary views are found expressed—so that the earlier decisions reported under the title of *Thorpe v. State of Idaho* and *Williams v. State of Idaho* must be regarded as mere interlocutory rulings which were rejected on final hearing and which therefore have no value as precedents. This may not be strictly true as applied to the decision in *Northern Pacific v. State of Idaho,* 39 L. D. 583, on which appellant so much relies, since that case did not involve the particular lands dealt with in *Thorpe v. State of Idaho,* 43 L. D. 168. But it *did* involve land in the same townships, and it presented the same questions. And the conclusions of the opinion in 39 L. D. 583 are inconsistent with and were

expressly overruled and repudiated in the later Thorpe decision and in the cases cited above which follow and apply that ruling. It seems strange that appellant's counsel should put so much emphasis upon a discredited and overruled case, which has no longer any standing as authority in the tribunal that rendered it.

It may now be regarded as established, so far as the Department has power to settle such a question, that the 1901 application for survey was inoperative, at least against claims initiated before January, 1905, for three independently sufficient reasons:

(1) Because the application for survey was rejected and disallowed by the Commissioner, whose decision became final for want of appeal and could not afterwards be questioned, whether right or wrong;

(2) Because when the Commissioner was finally persuaded, in January, 1905, to accord a qualified recognition to the claim of the State, the reservation and preference right then allowed was expressly made to date from January 18, 1905, and it was so noted on the records of the Land Department and in the Coeur d'Alene Land Office, and the State acquiesced therein;

(3) Because of failure to make substantial compliance with the requirements of the act of 1894, which are made conditions precedent to the attaching of the privilege conferred by the act, including the very important requirement for notation on the records of the Local Land Office of the fact that an application for survey had been made and that the State claimed a preference right thereunder—a provision

essential for the protection of the public and intending claimants as well as for the information of the local land officers.

It should be remembered that at the time the Railway Company filed its selection list on July 23, 1901, eight days after the application for survey was filed with the Commissioner of the General Land Office in Washington, that application had been rejected and disallowed by the Commissioner; the Company was without notice or knowledge that such an application had been made; the records of the Coeur d'Alene Land Office showed the land to be free from any sort of claim and open to selection by the Company (and did for three and a half years thereafter); the Company's selection was accepted and allowed by the local officers; and the representatives of the State had acquiesced in the rejection of the application for survey and for some years thereafter took no steps to assert or give notice of its alleged prior claim.

5.

Laying Departmental rulings out of sight for a moment, and looking at the question from a practical standpoint, and in the light of the language and intent of the statute, it is rather startling to consider how far the Court must travel to come to a decision overturning the patent in this case and awarding the land to appellant on the strength of Delany's rejected homestead application. It must be held that the attempted application for survey made by

the State under the act of 1894 was valid and operative, notwithstanding its disallowance by the Commissioner by an order from which no appeal was taken; notwithstanding the serious, if not fatal, defects in the matter of notice and publication; notwithstanding the fact that no notation of the application for the State's claim of preference right thereunder was made upon the records of the Land Department or the local land office until 1905; notwithstanding the affirmative ruling in 1905 by which the period reserved for the exercise of the State's preference right was made to date *"from and after January 18, 1905"*, and the acquiescence by the State in that ruling. And having sustained the application, it must be held further that by virtue thereof the lands were withdrawn and placed in reservation, so as to bar other forms of appropriation; although this is foreign to the purpose which the act was intended to serve; unnecessary to the protection of the privilege conferred upon the State; contrary to the established practice of the Department and a long line of Departmental decisions; and inconsistent with and subversive of the spirit and purposes of the general land laws. And this is a case where the State's attempted selection of the land was rightly rejected by the Department as unauthorized and void; where the State itself has acquiesced in that decision and makes no claim to the land; where the issue now rests between a party claiming under patent of the Government based upon a proper selection made on July 23, 1901, and a party claiming under an unsuccessful homestead application based upon an alleged settlement two years later; and where the settlement of the adverse claimant was just as much in conflict with the reservation

and withdrawal, if any such existed, as was the prior selection.

Suppose it were conceded that a valid application for survey would effect a reservation or withdrawal of the land and segregate it against other claims; and suppose it be also conceded that, as held in the earlier cases, it was beyond the power of the Commissioner to reject the application for survey to the prejudice of the rights of the State, and that there was a sufficient compliance with the requirements of the act of 1894 to secure to the State a preference right of selection. It is nevertheless a very different thing to hold, in a contest between individual claimants in which the State has no interest, that the lands were put in reservation and segregated against other appropriation by an application for survey which the Land Department rejected and refused to recognize, and of which no record was made in the local land office until years after selection by the Railway Company.

6.

Let us now consider, as a question of law, what the rights of appellant would be on the assumption that the application for survey should be held valid and operative. Appellant's present contention was disposed of by the Secretary of the Interior in his decision of November 18, 1915 (Record page 120) in the following language:

> "In his appeal Delany urged that the selection did not defeat his settlement because it was erroneously received and filed in the local office, and is inoperative, for the reason that an application had been made by

> the State of Idaho prior to the date on which the list was filed, for the survey of the township in which the land is located under the act of August 18, 1894, and was pending at the time the (selection) list was filed, and, therefore, prevented the acceptance and filing of the list. This contention is contrary to the holding of this Department in the closely kindred case of *Swanson v. Northern Pacific Ry. Co.*, 37 L. D. 74. The decision in that case is in harmony with the established practice of the Land Department, which sanctions the receipt and filing of applications for lands while they are subject only to mere preferred rights and appropriations, (*Stewart v. Peterson*, 28 L. D. 515-519)".

Appellant relies upon the words "reserved" and "withdrawn" as they appear in the act of 1894, and leans heavily upon the abandoned and overruled Departmental decision of March 20, 1911, 39 L. D., to which reference has already been made. But that case is a broken reed, since it is the one departure from a long line of Departmental decisions, covering a period of more than twelve years, which deal with similar claims based on these words of the act of 1894 and the provisions of other acts of similar purpose. And it has uniformly and consistently been held, over and over again, that such acts merely confers a preference right, and do not contemplate an absolute reservation or withdrawal of the land such as will prevent the initiation of other claims thereto in the interim between the date when the right takes effect and the expiration of the preference period.

Swanson v. Northern Pacific, 37 L. D. 74, cited by the Secretary in the Delany case, was decided about ten years ago. In the Swanson case the precise point here at issue, arising upon facts precisely similar, was squarely pre-

sented to and decided by the Department. In that case, as in this, the Railway Company selected the land under the act of March 2, 1899, at a date subsequent to application for survey by the State, which was assumed to be valid. After selection by the Company, but prior to survey, Swanson made a homestead settlement, and on his behalf it was asserted that the application for survey made by the State under the act of 1894 operated to withdraw or reserve the land so as to prevent selection thereof by the Railway Company under the act of 1899. As Swanson remained in settlement on the land at the time of survey, and at the time when the State's preference right expired, his entry must have been allowed unless the Company's selection was held valid from its inception. The Department held the Company entitled to the land, saying:

> "It is contended further that the application of the State of Idaho for a survey of the township of which the tracts applied for are a part, made prior to the selection by the Railway Company, operated to reserve the land from other disposition until after the expiration of three months from the filing of the approved plat of survey, and as his settlement was made and his homestead application presented prior to the expiration of said period, his entry should have been allowed. *The effect of the application of the State was not, however, to place the land in reservation, but only to secure to the State a preferred right to select the lands covered by its application. It did not operate to prevent the filing of other applications for the land subject to the superior right of the State.* In this case the State made no attempt to exercise its preferred right of selection, and there was therefore no bar to the consideration of other claims the same as though such right had never existed."

Again, in *State of Idaho v. Northern Pacific,* 37 L. D. 70, the same question arose; and it was there said:

> "It is contended that the Company was not entitled to select under the act of March 2, 1899, supra, * * * lands for the survey of which application was made by the State. * * * The objection that the lands were not subject to selection by the Company because embraced in the State's application for survey, even if well taken, could not be interposed as to the tracts applied for by Hooper. * * * As to Perkins, the objection, if valid, would only be material in so far as it relieved him from the necessity of proving his prior settlement. *The application of the State for survey did not, however, operate as an absolute withdrawal of the land described therein, but only subjected such lands to the preferred right of the State to select them within sixty days from the time of the filing of the approved plats of survey.*"

Appellant's counsel says that the italicized language in the quotation from the *State of Idaho v. Northern Pacific* "is mere *obiter dictum*"; and he brushes aside the decision in *Swanson v. Northern Pacific* with the statement that the decision "is based entirely upon the decision in the case of *State v. Northern Pacific, supra*, and the question here involved *was not raised or discussed.*" These suggestions are sufficiently answered by reference to the foregoing quotations and the statement of facts and decision in the Swanson case which precedes the quotation from that opinion.

The most recent cases in which this question has been considered and decided by the Department are *Northern Pacific v. State of Idaho*, 45 L. D. 37, and *Verdine R. Hall*, 45 L. D. 574. In both cases the contention now made by appellant, on arguments precisely similar to those which she presents, is carefully examined in the light of the statute and it is held (as it was held ten years ago in the Swanson case) that the effect of the act of 1894 is merely to confer a preference right and that it does not place the

land in reservation. These cases represent the last word of the Department on the subject; and because of the facts, and the line reasoning adopted, are precisely in point on the present question.

In the leading case of *Heirs of Irwin v. State of Idaho*, 38 L. D. 219, it was said:

> "In disposing of the State's claim it is sufficient to say that the question presented, or questions entirely similar, have been repeatedly determined by this Department and the courts. The preference right awarded the State by the act of 1894 seems to be in no way superior to the preference right awarded the successful contestant by the act of May 14, 1880, supra. * * * *The act of 1894 merely gives the State a preference right of selection* over all other applicants, and in thus inviting the State to apply for the survey of lands whereby a preference right over others may be secured, the Government in no way commits itself or agrees to withhold the lands from any disposition which it may find necessary to make of the same."

State of Utah, 33 L. D. 358, is another much cited case; and it was there said:

> "Waiving the question as to whether the record shows sufficient compliance with the act of 1894 on the part of the State in the matter of the publication of notice, *it is clear that the only right intended to be granted the State was that of a preference over other intending claimants* under the public land laws, to make selections of such lands as it desired and needed, within the period of sixty days after the filing of the township plats of survey, and that under the State's application no such claim attached as prevented the appropriation of the lands by the United States under an act of Congress until formal selection thereof had been made by the State."

In the Attorney General's opinion of September 15, 1909, (38 L. D. 224), which was in part the basis for the deci-

sion in the Irwin case, full consideration was given to the doctrine previously declared by the Department that an application for survey under the act of 1894 does not result in the segregation or reservation of the land, but operates merely to give the State a preference right of selection; and the Attorney General concluded that this construction of the statute is not only reasonable, but plainly right; and that it should be consistently adhered to by the Department. In discussing the State of Utah case cited above, the Attorney General says:

> "This decision was on the ground that the sole claim of the State * * * rested upon the application of the Governor for a survey of the land, whereas the only right intended to be conferred upon the State by the act of August 18, 1894, was simply one of preference over other intending claimants to the unsurveyed public lands."

In *Cronan v. West,* 34 L. D. 301, it was said:

> "The preference right given by the act of March 3, 1893, is analogous to the preference right of a successful contestant *and does not segregate the land against other applications;* and they are entitled to be received, subject to the State's right, and if that is not exercised, take effect from their presentation."

See also: *State of Idaho v. Northern Pacific,* 39 L. D. 343, and *Northern Pacific v. Mann,* 33 L. D. 621.

7.

It is a cardinal rule of statutory construction that the intent of Congress is to be sought, not merely in the bare words of its enactments, but also in the light of the evident

aims and objects of the act considered; and that the interpretation to be placed upon terms used in the act shall be that which will carry out the purpose Congress sought to effect, without unnecessarily disturbing settled conditions and established rules of law and policy, the disturbance of which is really foreign to the purpose of the legislation and unnecessary to the full accomplishment of the object of the act. This is especially true where the contrary interpretation works out a result more or less inconsistent with the policy of other congressional enactments and with the public interest. In such a case the courts will not hesitate to restrict the broad language of a statute to a meaning which, while it carries out fully the manifest intent of Congress, does not go beyond the legislative purpose and work results which the law-making power evidently did not contemplate or desire.

We quote below the language of some of the leading decisions of the Supreme Court of the United States which deal with this subject; prefacing, however, with a statement of the rule given by Sutherland in his great work on Statutory Construction, which has frequently been quoted and applied by various state and federal courts.

> "It is indispensable to a correct understanding of a statute to inquire first what is the subject of it; what object is intended to be accomplished by it. When the subject-matter is once clearly ascertained, and its general intent, a key is found to all its intricacies; general words may be restrained to it, and those of a narrower import may be expanded to embrace that intent. * * * *General words may be cut down when a certain application of them would antagonize a settled policy of the State.* * * * Mr. Justice Field said: 'Instances without number exist where the meaning of words in a statute has been enlarged or restricted, and qualified to carry out the intention

of the legislature'. * * * The intention of an act will prevail over the literal sense of its terms. * * * The true meaning of any clause or provision is that which best accords with the subject and general purpose of the act."

Sutherland Stat. Constr. (1st Ed.), Secs. 218-219.

"The statute * * * must be examined in the light of the objects of the enactment, the purposes it is to serve, and the mischiefs it is to remedy, bearing in mind the rule that the operation of such a statute must be restrained within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it."

Fuller, C. J., in *United States v. American Bell Telephone Co.,* 159 U. S. 548, 549.

"It is undoubtedly the duty of the court to ascertain the meaning of the legislature, from the words used in the statute, and the subject-matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it."

Taney, C. J., in *Brewer v. Blougher,* 14 Pet. 197, 198.

"If a literal interpretation of any part of it (a statute) would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment."

Davis, J., in *Heydenfeldt v. Dancy Gold Min. Co.,* 93 U. S. 638; quoted with approval in *Hawaii v. Mankichi,* 190 U. S. 197, 213.

"But the subtle significance of words and the niceties of verbal distinction furnish no safe guide for construing the act of Congress. On the contrary, it should be interpreted and enforced by the light of the fundamental rule of carrying out its purpose and object, of affording the remedy which it was intended to create, and of defeating the wrong which it was its purpose to frustrate."

White, J., in *Rhodes v. Iowa,* 170 U. S. 412, 422.

"If it be true that it is the duty of the court to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it relates, there is an equal duty to restrict the meaning of general words, whenever it is found necessary to do so, in order to carry out the legislative intention."

Davis, J., in *Reiche v. Smythe,* 13 Wall. 162.

"It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute."

Brewer, J., in *Holy Trinity Church v. United States,* 143 U. S. 457, 472.

It may be that the act of August 18, 1894, if read literally and without regard to the evident object of Congress and the general policy of legislation with respect to the public domain, might be thought to provide that the application for survey should operate to withdraw or reserve the lands absolutely from any appropriation before sur-

vey. But the mere words of the act cannot be considered apart from its plain intent and purpose. And this was not what Congress intended. The object of the act was to enable the State to secure for itself a preference right of selection. The State is not authorized to make selections before survey; and it was claimed that the most desirable lands were being taken up while still unsurveyed, so that when the time came at which the State might exercise its right to select in satisfaction of its land grants, the valuable lands would all be appropriated. Therefore Congress was induced to make provision which would permit the State, by taking the prescribed steps, to secure a first right of selection which should be superior to claims initiated after those steps were taken.

In order that the object of the enactment may be fully attained, and the State given the fullest possible protection, it is only necessary to hold (as the Department has heretofore held) that compliance with the act gives to the State a preference right of selection superior to all claims initiated after the application for survey. It is *not* necessary for the protection of the State or to effectuate the objects of the enactment to hold that the application for survey operates to reserve, withdraw, or segregate the land, so as to bar the initiation of rights thereto subject to the superior claims of the State. Such a rule does not help the State at all, and has no tendency to accomplish the purpose of the act. If the State has a preference right of selection under the act, it has everything which can possibly benefit it. The view that the application for survey creates an absolute reservation of the land is in no respect to the advantage of the State as a proprietor, and is directly to its disadvantage from a governmental stand-

point, since it tends to discourage settlement and development.

The mischiefs which Congress sought to remedy in the act of 1894, and the advantage which it was intended to give to the State, are so plain and obvious that it is hard to see where respectable ground can be found from which to argue for a construction of the act of 1894 different from that heretofore given it by the Department. And it ought not to be necessary to carry the discussion farther. But there is another reason against the view that the act effects an absolute reservation of the land which is worthy of consideration.

The policy of the Government for many years past has been to encourage settlement upon unsurveyed lands, and there has been much legislation for the protection of such settlers. There has also been considerable legislation providing for the selection or other appropriation of unsurveyed lands, the grant of the right to select unsurveyed lands being frequently held out as a consideration for relinquishments and exchanges which could not have been obtained had the sole inducement been the right to make selections after survey. Except where lands have been withdrawn before survey for a definite national use, as for Indian, military, or forest reservations, or for national parks, it has never been the policy of the Government to prohibit, limit, or discourage settlement on unsurveyed lands or the appropriation thereof under acts permitting the selection of such lands. Where withdrawals or reservations have been made, it has always been for some such definite purpose—and this is equally true of temporary withdrawals made pending the consideration of

the question whether the lands should be permanently withdrawn.

At an earlier stage of the history of the public grants for internal improvements, great tracts of land were frequently withdrawn by the Department for the protection of the beneficiaries of railroad and other grants, in advance of the time when rights under the grants could attach to specific lands. At first these withdrawals were sustained by the lower courts, and were not prohibited by Congress—indeed, in some of the earlier cases the courts seemed to find express Congressional authority for such withdrawals. But this practice was long ago overthrown and abandoned, and in their later decisions the courts have held that such withdrawals were unauthorized and void, although made by the Secretary under supposed authority of statute. In short, the withdrawal of large bodies of land in aid of the beneficiary entitled to a portion of the land so withdrawn, or entitled to make selections therefrom in satisfaction of a quantity grant, is a practice which has been condemned and abandoned; and if this act is open to such an interpretation, we think it is the only example of such legislation which can now be found.

8.

Let us concede for the moment that the language of the act of 1894 is fairly open to either construction—let us even concede that upon the face of the statute, and as a matter of first impression, the construction against which we argue is the one which the Department might now adopt if the question were before it for the first time.

Nevertheless the statute has been construed otherwise by the Department; that construction has been applied in a number of decisions; large quantities of land have been disposed of in that view; vested rights have attached; and it is doubtless true that numerous settlements and other claims have been initiated on the faith of the rule declared in previous departmental decisions. In this situation it seems especially appropriate to refer to the well settled rule that where an act is in any degree doubtful or ambiguous, in language or intent, the construction placed upon it in contemporary administration by the Department charged with the duty of executing it, is entitled to great weight; and where such construction has been recognized and applied over a series of years, it should be deemed conclusive—even though such construction may be of doubtful correctness when considered as an original proposition.

La Roque v. United States, 239 U. S. 62, 64.
Logan v. Davis, 233 U. S. 613, 627.
United States v. Hammers, 221 U. S. 220, 228.
Louisiana v. Garfield, 211 U. S. 70, 76.
Hewitt v. Schultz, 180 U. S. 139, 156, 163.
United States v. Alabama, etc., Railroad, 142 U. S. 615, 621.
Heath v. Wallace, 138 U. S. 573, 582.
United States v. Moore, 95 U. S. 760, 763.

9.

In this Court, as in the court below, appellant leans rather heavily on the decision of the Supreme Court in *St. Paul, Minneapolis and Manitoba Railway Company v.*

Donohue, 210 U. S. 21—although we have never been able to understand why. The Donohue case, like this, involved a conflict between a homestead settlement claim and a lieu selection under an act similar to that of March 2, 1899. But that case is otherwise the exact opposite of this; since there the homestead settlement was made two years *before* selection by the Railway Company. The question debated by the Supreme Court in the Donohue case was whether the circumstances of the prior settlement were such as to attach a valid claim to the land, which was subsisting and in force at the time of the Railway selection. And having concluded, although with some difficulty, that there was a valid and subsisting settlement claim, the Court applied the rule that the existence of such a claim prevented its selection under an act like that of March 2, 1899.

We have never disputed the existence or correctness of this rule, and do not now. But we are unable to see what it has to do with the present case, since it is admitted that there was no settlement on the land here in controversy until long after its selection by the Railway Company. And there is no connection whatever between the rule applied in the Donohue case, and the contention that a general preference right segregates the land absolutely against the initiation of other claims during the preference period—as to which see the authorities last above cited.

10.

The Donohue case is also referred to by appellant's counsel in connection with other authorities which they invoke, in support of their contention that the application

for survey, notwithstanding its invalidity, and not withstanding the refusal of the Land Department to allow or recognize it prior to 1905, nevertheless operated to withdraw the land from the public domain and segregate it against other forms of appropriation. This theory is very effectively disposed of by the opinion of the learned trial court. Its primary and essential fallacy lies in the failure to distinguish between the effect of a blanket application for survey under the act of 1894, and the effect of a specific claim to appropriate particular land by homestead settlement, entry, selection, or other form of appropriation under the public land laws.

In the latter case a specific, positive and unqualified claim of right to appropriate the particular land is fastened upon the land by the initial steps prescribed by law. And it is settled law that when such a claim is recognized and allowed by the local officers in a preliminary way, and becomes a matter of record in the Land Department, the land is segregated from the public domain; and while the entry or selection remains uncancelled and intact of record, the land is not subject to any other form of appropriation, and no rights can be acquired by subsequent settlement, selection or application to enter. An application for survey under the act of August 18, 1894, has no such characteristic. It is, in form and substance, a mere blanket application to the Land Department for the *survey* of a designated township or townships. By virtue of the statute the effect of the application, *if the conditions of the act are complied with,* is to give the State a preference right to select, running for a specified period, which may be exercised or not at the pleasure of the State. It does not commit the State to the selection or acceptance

of any particular land in the township, nor even to the selection of *any* land therein, in satisfatcion of its grants. It does not amount to an assertion of right to any particular land, nor fasten a claim upon any tract. The difference between the effect of a blanket application of this character and the effect of an ordinary entry or selection of particular land is as wide as the difference between day and night.

It is for this reason that the Department has repeatedly held that application for survey under the act of 1894 is *not* a barrier to the initiation of a claim under public land laws, subject to the preference right of the State; and that it gives the State no right to the land as against a subsequent withdrawal for a forest reserve under a proclamation containing an excepting clause in favor of any entry, filing or "lawful claim"—although such exception is held to protect fully a homestead settlement, timber and stone or desert land entry, or lieu or indemnity selection.

It is true that if at the time the Railway Company selected the land in suit it had been subject to an existing claim, previously initiated, and then intact of record, it would not have been open to selection by the Railway Company. But that is all the cases cited in appellant's brief mean. And we have no quarrel with that proposition. Nevertheless, as the Department has repeatedly held, and as the trial court holds, a blanket application for survey *(even if valid and effectual, as the application for survey now under consideration was not)* accomplishes no such result. And the rule which has been established by the practice of the Land Department and the decisions of the courts, that the initiation of a specific claim to appropriate particular land, allowed in a preliminary way by

the officers of the Land Department, and remaining intact of record, segregates the land against subsequent appropriation while the claim remains *sub judice* and undisposed of, has nothing to do with a case like this.

Again, as pointed out by the trial court, this rule applies only in cases where the prior application or entry has been *recognized or allowed*. "To have segregative effect an application or entry must in some way be accepted or recognized by the Land Department; having been allowed, even though erroneously, it is binding upon and segregates the land." (Record, page 143.) And the State's application for survey was never accepted, recognized or allowed, in any form, until January, 1905; and then, its recognition and allowance were expressly made to date from *January 18, 1905*, only. (Record, page 141.) The earliest departmental decision in any way upholding the validity of the application was that of *Thorpe v. State of Idaho,* 35 L. D. 640 (afterwards recalled and vacated) which was decided *June 27, 1907*. The Railway Company's selection was made *July 23, 1901*, three and a half years before the former and nearly six years before the latter date.

We may concede that if the lands had been "reserved" or "withdrawn" prior to the filing of the Railway Company's selection list, this would have barred the selection, under the language of the act of March 2, 1899. But in the first place it has been settled, so far as Departmental construction can settle it, that even a valid application for survey recognized and allowed by the Land Department does not operate to "reserve" or "withdraw" the land within the meaning of the act of 1899. In the next place, if that construction of the statute be disregarded, it is perfectly obvious that only a *valid* application for survey, or

at the very least an application recognized and allowed by the Department, could operate as a "reservation" or "withdrawal."

It seems unnecessary to argue that the application for survey is not a "claim or right" to the particular land, which "attached" or was "initiated" within the meaning of the act of March 2, 1899. The meaning of those words, as used in the public land law is too well settled by numerous decisions of the Supreme Court, many of which are cited in the Donohue case. And this definition was firmly established in public land law terminology long before the act of 1899 was passed. Such words apply only to a specific claim of right to appropriate particular land, fastened upon the land by the initial steps which the law requires for the appropriation thereof. They do *not* apply to a blanket reservation or withdrawal or the acquisition of a preference right under an act like that of August 18, 1894.

11.

The Railway Company's selection was made by filing a proper selection list in the local land office at Coeur d'Alene, in conformity to the provisions of the act of 1899 and the regulations and practice of the Department applicable to such cases. This selection list was duly accepted and allowed by the local officers, and the selection duly noted upon the records of that office. In accordance with the established practice the selection list was subsequently transmitted to the General Land Office at Washington and accepted there; although final action thereon was necessarily deferred until after survey. But the acceptance

and allowance of the selection by the local officers was never reversed or set aside; and the selection has remained "intact of record" at all times since the day the selection list was filed.

Now it is settled law that an entry or selection allowed by the local land officers, whether valid or not, *segregates* the land against every other form of appropriation under the public land law, until such entry or selection is regularly cancelled upon the records of the Land Department. While such entry remains intact of record and uncancelled, no rights can be initiated or secured by any subsequent settlement, entry, application or selection, notwithstanding such previous entry or selection is irregular or invalid—even though it be subsequently cancelled or rejected by the Department.

In the present case the Railway Company's selection was duly presented to and approved and allowed by the local officers (and subsequently by the Commissioner of the General Land Office and the Secretary of the Interior), and that selection stood of record, intact and uncancelled, at the time Delany made his alleged settlement on the land and at all times thereafter, until the issuance of patent. Therefore, this selection constituted a complete barrier against the attempt of Delany to acquire the land; and he secured no right under his settlement and application to enter; and this without regard to how far the status of the land may have been affected by the application for survey. So Delany's claim was properly rejected by the Land Department, however erroneous its allowance of the Railway Company's selection may have been.

And this is fatal to appellant's case. For it is familiar law that if error was committed by the Department in awarding patent to the Railway Company, it is not error of which Delany or his successor is entitled to complain. In cases like this it is not enough for the appellant to show error in awarding patent to his adversary; he must also show that if the law had been properly administered the patent would have been awarded to *him*. And if his application was rightly rejected, because the land was segregated against such claim as his at the time of his settlement and application to enter, a suit like this cannot be maintained.

Holt v. Murphy, 207 U. S. 407.

McMichael v. Murphy, 197 U. S. 304.

Hodges v. Colcord, 193 U. S. 192.

Hastings & Dakota Railroad Co. v. Whitney, 132 U. S. 357.

Sturr v. Beck, 133 U. S. 541, 548.

Whitney v. Taylor, 158 U. S. 85, 93.

Kansas Pacific Railroad Co. v. Dunmeyer, 113 U. S. 629, 644.

Witherspoon v. Duncan, 4 Wall. 210, 218.

Neff v. United States, (C. C. A. 8th Cir.) 165 Fed. 273, 281.

Germania Iron Co. v. James, (C. C. A. 8th Cir.) 89 Fed. 811.

James v. Germania Iron Co., (C. C. A. 8th Cir.) 107 Fed. 597.

Weyerhaeuser v. Hoyt, 219 U. S. 392.

The foregoing cases demonstrate that the segregative effect of an entry or selection does not depend upon its in-

herent validity, but merely upon the fact that when presented it is recognized by the local officers and remains intact of record at the time a subsequent adverse claim is sought to be initiated. Whether valid or not it is a complete barrier against the attaching of any right by virtue of settlement, application, or otherwise, made while the prior entry or selection remains uncancelled of record. This is well explained in *Edith G. Halley,* 40 L. D. 393, where it is said:

> "In *McMichael v. Murphy,* (197 U. S. 304) the court held that a settlement on land already covered of record by another entry, valid upon its face, does not give such settler any right in the land, notwithstanding that the first entry might subsequently be relinquished or ascertained to be invalid by reason of facts dehors the record of such entry, and that the party first entering after the relinquishment or cancellation had priority over one attempting to enter prior to such relinquishment or cancellation. In that case, one who settled upon the land covered by a formal entry prior to its cancellation, was held to be inferior in right to the first applicant after the cancellation of the entry. In James v. Germania Iron Company, (C. C. C. A. 8th Cir. 89 Fed. 811, 107 Fed. 597) the court held that an entry of public land under the laws of the United States, whether legal or illegal, segregates it from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially cancelled and removed."

And there is no distinction in this respect between an ordinary homestead or other entry, and an indemnity or lieu selection accepted by the local officers and entered of record in their office.

Weyerhaeuser v. Hoyt, 219 U. S. 392.

Southern Pacific Railroad Co., 32 L. D. 51, 53.

Santa Fe Pacific Railroad Co., 33 L. D. 161, 162.

Santa Fe Pacific Railroad Co. v. Northern Pacific Ry. Co., 37 L. D. 593, 596.

Santa Fe Pacific Railroad Co. v. California, 34 L. D. 12.

Santa Fe Pacific Railroad Co. v. Northern Pacific Ry. Co., 37 L. D. 669, 671.

Coffin v. Moore (unreported), decided Jan. 10, 1911.

State of Idaho v. Northern Pacific Ry. Co., 42 L. D. 118, 123.

Eaton v. Northern Pacific Ry. Co., 33 L. D. 426.

Malone v. State of Montana, 41 L. D. 379.

Gallup v. Welch, 25 L. D. 3.

Hanson v. Roneson, 27 L. D. 382.

Northern Pacific Ry. Co. v. Wolfe, 28 L. D. 298.

Olson v. Hagemann, 29 L. D. 125.

Southern Pacific R. R. Co. v. California, 4 L. D. 437.

Southern Pacific Railroad Co. v. Cline, 10 L. D. 31.

George Schimmelpfenny, 15 L. D. 549.

St. Paul & Sioux City R. R. Co. v. Minnesota, 24 L. D. 364.

F. C. Finkle, 33 L. D. 233.

California & Oregon Land Co., 33 L. D. 595.

Santa Fe Pacific Railroad Co., 34 L. D. 119.

Porter v. Landrum, 31 L. D. 352.

O'Shea v. Coach, 33 L. D. 295.

Heirs of George Liebes, 33 L. D. 460.

Minnesota v. Leng, 25 L. D. 432.

Thomas v. Spence, 12 L. D. 639.

Some of the cases cited above involve railroad indemnity selections; some State school land indemnity selections; some State selections under general grants; and some lieu

selections under acts like those of June 4, 1897, and March 2, 1899. But it is probably unnecessary for us to point out the precise similarity, so far as concerns the application of the rule, between those various classes of selections —we think the most astute mind could find no basis for distinction between them in this respect.

In Weyerhaeuser v. Hoyt, supra, the Supreme Court of the United States quoted with express approval the language of Mr. Justice Van Devanter (then Assistant Attorney General) in *Southern Pacific Railroad Co.,* 32 L. D. 51, which runs as follows:

> "A railroad indemnity selection, presented in accordance with departmental regulations *and accepted or recognized by the local officers,* has been uniformly recognized by the Land Department as having *the same segregative effect as a homestead or other entry made under the general land laws.*"

This gives the rule the express sanction of the Supreme Court. But it is so firmly established by innumerable departmental decisions, and by the reasoning of cases where the Supreme Court and the Department have accorded segregative effect to homestead and other entries, that such sanction is hardly necessary.

The language thus quoted from *Southern Pacific Railroad Co.,* 32 L. D. 51, is also quoted with approval in *Santa Fe Pacific Railroad Co.,* 33 L. D. 161, 162, where it is further said:

> "A pending selection list is therefore given the same force in segregation of the land as an actual entry, and lands so conditioned are within the rule fixed by circular of July 14, 1899, 29 L. D. 29."

The circular referred to contains the language which, in *Holt v. Murphy,* 207 U. S. 407, the court quoted approvingly from *Stewart v. Peterson,* 28 L. D. 515.

In *Santa Fe Pacific Railroad Co. v. Northern Pacific Railway Co.,* 37 L. D. 593, the question was whether certain unapproved indemnity selections by the Northern Pacific Company (afterwards cancelled) segregated the land as against certain lieu selections proffered by the Santa Fe Pacific Company, and the Secretary said:

> "This contention may be disposed of by reference to the instructions contained in the circular of July 14, 1899, 29 L. D. 29, which are to the effect that no application will be received or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record until such entry has been cancelled upon the records of the local land office. The term 'entry' as used in this circular has been construed uniformly to include any claim under the public land laws, which operates to segregate the land applied for from the public domain. The rule was promulgated in the interest of good administration, and it has been uniformly followed since its promulgation. Inasmuch as the record shows that the selections of the Northern Pacific Railway Company had not been cancelled at the time of the application submitted by the Santa Fe Pacific Railway Company, it follows that the latter selections were properly rejected."

The reason for the rule is more fully stated in a later case, carrying the same title and involving the same sort of controversy as the case last cited. This was *Santa Fe Pacific Railroad Co. v. Northern Pacific Railway Company,* 37 L. D. 669:

> "The rule now in force and the one obtaining at the time the applications in question were presented is contained in 29 L. D., at page 29, and provides that

no application will be received or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record until such entry has been cancelled upon the records of the local office. The term 'entry' as used in these regulations has been uniformly held to include also any bona fide selection or application to locate."

In *Coffin v. Moore* (unreported, decided January 10, 1911) the Secretary said:

"It is true that an indemnity selection presented by a railroad company is not effective against the United States until approved by the Secretary of the Interior; that the Secretary's approval is essential to the validity of any such selection, as the statute provides that indemnity selections must be made under his approval. At the same time, however, it is absolutely necessary to a proper administration of the land laws that there should be some rule respecting the segregative effect of a railroad company's indemnity selection until such times as it can receive proper consideration from the officers whose duty it is to dispose of the same. Having under consideration the necessity for, and effect of, rules of the land department, the Circuit Court of Appeals for the Eighth Circuit has held that it is essential to the impartial exercise of such power as exists in the land department that rules and regulations should be adopted and steadily maintained establishing a uniform practice and method of procedure; that the legislation of Congress was ample for the establishment of such rules, and when promulgated they become a law of property and cannot be ignored by the Department to the subversion of rights acquired under them; and, further, that an established rule of practice of the land department that after a decision by the Secretary has been made cancelling an entry of public lands, no subsequent entry of such lands can be made until a decision has been officially communicated to the local land officers and a notation of the cancellation made on their plats and records, is a proper, just and reasonable rule and is in accordance with the policy of Congress which makes the local offices the place for the initiation and

establishment of all claims under its laws. See *Germania Iron Company v. James, et al.,* 89 Fed. Rep. 811."

As explained in many of the decisions cited above, and also in the opinion of the Court of Appeals in *U. S. v. C. M & St. P. Ry. Co.,* 160 Fed. 818, the element upon which the segregative effect of an entry or selection depends is its *recognition* by the Land Department. As the Court says in the case last cited:

> "The cases * * * all disclose an assertion of a right to certain land by claimants *which was recognized in some manner by the Land Department. We understand the crucial test of segregation is found in such recognition.* The right or claim, in order to constitute a segregation, must be such as in some manner, either by receipt of fees for entry, permission to file upon the land, noting the filing upon tract-books, submission to a commission under treaty obligation, or other like affirmative action of the Land Department, discloses a recognition of the claim, or discloses some privity between the claimant and the United States."

And it is uniformly held that the acceptance of an application to enter or select by the local land officers, the receipt of fees by them, or the notation of the entry or selection upon the records of their office, is enough to give it segregative effect; regardless of whether this action is recognized, sanctioned or approved by the Department or the General Land Office, and regardless of whether the entry or selection is ultimately held valid or invalid.

There is some conflict of Departmental decision as to whether a selection of unsurveyed land has the same segregative effect that an entry or selection of surveyed land, has. But an examination of the authorities cited will

demonstrate that the reason for the rule is the same in either class of cases. And in *St. Paul, Minneapolis and Manitoba Railway Co. v. Donohue,* 210 U. S. 21, 40, it was held that a mere settlement on unsurveyed lands was sufficient to work segregation thereof against subsequent claims; which is, of course, conclusive authority against the suggested distinction between surveyed and unsurveyed lands with respect to the segregative effect of a selection thereof.

12.

Throughout appellant's brief it is asserted that Delany went on the land in the belief that it was free from any prior claim; that he had no knowledge or notice of the Railway Company's selection; that the records of the Coeur d'Alene Land Office did not show that the land had been selected by the Company; and that a search of those records by Delany, or anyone acting for him, would not have disclosed the fact. Now in the first place there is nothing in the evidence to justify the statement that Delany was not aware that the land had been selected by the Railway Company or that he believed the land to be free from other claims. And in the second place it is not true that the records of the Coeur d'Alene Land Office did not disclose the Company's selection. In fact the most casual inspection or inquiry at the Coeur d'Alene office would have elicited this information. As this Court said in the West case (221 Fed. 30):

"The selection list was filed in the Local Land Office, and this was notice to all parties that the Railway Company claimed the land."

Respectfully submitted,

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SKUSE & MORRILL,
Counsel for Appellees.

Note: *Attention is called to the memorandum of errata in the printed record, and to the index of exhibits in the record, which appear on the following pages.*

APPENDIX.

MEMORANDUM OF ERATA IN PRINTED RECORD.

The index to the abstract of evidence is incorrect, in that no mention is made of the testimony of Clay Tallman, Commissioner of the General Land Office, taken by deposition, which begins on page 67 and ends on page 79 of the record. This matter is incorrectly indexed as the testimony of Ira McPeak.

The index of exhibits is insufficient to identify the various documents from the files of the Commissioner of the General Land Office introduced in evidence as plaintiff's Exhibits 2-A, 2-B, 2-C and 2-D. See the index to exhibits printed on the page next following this.

Page 67 of record, eighth line from the bottom, the township number should be "45" instead of "34".

Page 91, 9th line from the top, the month should be "July" instead of "January".

The various documents making up the plaintiff's exhibits are insufficiently separated. If a separating line be drawn in the places indicated as follows, the documents will be more intelligible:

Page 86, between lines 18 and 19.

Page 107, immediately below the words "Approved Sept. 25 1901" near the bottom of the page, and just above the date "June 4, 1909".

Page 112, between the 8th and the 9th lines (just above the heading "Department of the Interior").

Page 113, between the 7th and 8th lines (just above the heading "Department of the Interior").

Page 115, just above the heading "Department of the Interior" near the bottom of the page.

Page 117, between the 11th and 12th lines (just above the heading "Department of the Interior").

Page 117, immediately above the 6th line from the bottom of the page.

Page 119, between the 15th and 16th lines.

Page 121, between the 8th and 9th lines.

Page 122, between the 6th and 7th lines.

Page 125, immediately before the last line on the page.

Page 135, between the 4th and 5th lines.

INDEX TO EXHIBITS IN PRINTED RECORD.

(Note: The index appearing in the printed record does not sufficiently describe the exhibits, some of which consisted of numerous papers and documents from the files of the Commissioner of the General Land Office. The following index to exhibits is therefore submitted, for the convenience of the Court.)